No. 82-1827

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN BROADLEY
General Counsel

LAWRENCE H. RICHMOND
Deputy Associate General Counsel

EVELYN G. KITAY
Attorney

Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the Interstate Commerce Commission acted inconsistently with its governing statute or abused its discretion in concluding that rate bureaus may not prevent members wishing to take independent action by making individual rate changes from having those rate changes filed with the Commission without prior notice to other bureau members.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-31a)[1] is reported at 688 F. 2d 1337. The decisions of the Interstate Commerce Commission (App. 32a-72a, 73a-84a, 85a-91a) are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092, and 364 I.C.C. 921.

JURISDICTION

The judgment of the court of appeals (App. 92a-93a) was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983 (App. 94a-95a). The petition for

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[1]The government has petitioned for a writ of certiorari in this case on unrelated issues in *Interstate Commerce Commission* v. *American Trucking Associations*, No. 82-1643. "App." refers to the appendix filed with that petition.

a writ of certiorari in No. 82-1643 was filed on April 7, 1983. This cross-petition was filed on May 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10101 *et seq.*, carriers establish and change their rates for transportation services by filing rate schedules, known as tariffs, with the Interstate Commerce Commission. A tariff filed with the Commission generally becomes effective only after a waiting period.[2] Since 1948, motor carriers subject to regulation by the Commission have been authorized to enter into rate agreements with other carriers (Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 *et seq.*, now codified at 49 U.S.C. (Supp. V) 10706(b)).[3] The carriers have established rate bureaus to facilitate the negotiation of collective rates, and to act as their members' agents in submitting to the Commission tariffs containing those rates as well as rates established by their individual members. The carriers' activities in a rate bureau do not violate the antitrust laws so long as the agreement establishing the bureau has been approved by the Commission, and the carriers' actions conform to the agreement. See *Motor Carriers Traffic Association* v. *United States*, 559 F.2d 1251, 1253-1254 (4th Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

A key provision of the Reed-Bulwinkle Act was the requirement that all rate bureau procedures for collective ratemaking provide to each party "the free and unrestrained

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[2]The waiting period for railroad rates is 20 days (10 days for reductions), 49 U.S.C. (Supp. V) 10762(c)(3), and motor carrier rates become effective after 30 days. 49 U.S.C. (Supp. V) 10762(a)(2). The Commission, however, has the power to shorten the waiting period. 49 U.S.C. (Supp. V) 10762(d)(1).

[3]Although the Reed-Bulwinkle Act also applies to rail carriers (49 U.S.C. (Supp. V) 10706(a)), this case involves only motor carriers and shippers.

right to take independent action either before or after any determination arrived at through such procedure."[4] Thus, although Congress permitted the bureaus to set rates collectively, it also expressly preserved each bureau member's absolute right to bypass bureau procedures and file its rates entirely free of bureau interference.

Until Congress enacted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, 49 U.S.C. (Supp. V) 10101 note *et seq.* ("1980 Act"), the Commission had broad authority to define the conditions under which it would approve rate bureau agreements (49 U.S.C. 5b(2)). In Section 14 of the 1980 Act (94 Stat. 803), however, Congress enacted specific statutory restrictions with which motor carriers must comply if they wish to maintain their antitrust immunity (49 U.S.C. (Supp. V) 10706(b)(3)). These statutory restrictions include a provision that gives renewed emphasis to the guarantee of the "absolute right" of independent action: Section 14 provides that a bureau "may not interfere with each carrier's right of independent action." 49 U.S.C. (Supp. V) 10706(b)(3)(B)(ii). This restriction affirms Congress's intent to "place[] strict limitations upon rate bureau treatment of independent actions of member carriers." H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 30 (1980).

2. The Commission implemented Section 14 with the rules adopted in *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, Ex Parte No. 297 (Sub-No. 5) (ICC Dec. 19, 1980) (App. 32a-72a). Although the rules cover a wide variety of subjects, petitioners' sole challenge in this Court is to a rule giving carriers proposing independent rate

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[4]Former Section 5a(6), 49 U.S.C. 5b(6). When the Interstate Commerce Act was recodified without substantive change in 1978, the words "free and unrestrained right" were changed to "absolute right" (49 U.S.C. (Supp. II) 10706(c)(2)(C)). That formulation was retained in the Motor Carrier Act of 1980 (49 U.S.C. (Supp. V) 10706(d)(2)(C)).

changes the right to prohibit the bureau from giving advance notice of their independent actions to other carriers and shippers before the rate is filed with the Commission (App. 35a-46a). In promulgating the rule, the Commission referred to the general rate bureau practice, known as "docketing," under which the bureau notifies shippers and the bureau's carrier members of an independent action by an individual carrier before the bureau files the rate with the Commission on behalf of the individual carrier (App. 38a). The Commission recognized that docketing permits other carriers to join in an independent action before the independently set rate becomes effective (*ibid.*). Because the Commission wanted to preserve for the carrier competitive advantages that might flow from being the first carrier to implement a new rate, the Commission adopted a rule making it clear that the individual carrier, and not the bureau, will decide whether an independent action should be docketed. Thus, while the Commission did not prohibit docketing individual actions,[5] it concluded (*id.* at 37a, 38a, 41a) that a rate bureau should not be able to *require* docketing of independent actions, but should accord the individual carrier complete freedom to determine how much notice, in addition to the statutory 30 days notice (see note 2, *supra*), should be given.[6] In sum, docketing could continue only if agreed to by a carrier taking independent

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[5]The Commission's interim rules had suggested a ban on docketing, publication, circulation, or discussion of independent actions in advance of Commission filing. However, after the majority of those commenting on the interim rules opposed this proposal, the Commission decided against a total ban (App. 36a-37a).

[6]The Commission explained (App. 38a-39a) that although a bureau under the old law would have had to obey an independent actor's instruction to publish an independent action without prior notice, rate bureau agreements in effect prior to the 1980 Act generally incorporated provisions for the advance notice docketing procedure.

action and the bureaus were prohibited from disobeying a carrier's direction that its independent action not be docketed.

3. The court of appeals affirmed the independent action rule (App. 10a-15a). The court concluded (*id.* at 14a) that the rule comports with Section 14 because mandatory docketing is a restriction on the right of independent action, and the statute is intended to limit opportunities for collective ratemaking and encourage "more independence in formulating individual rates." Noting that "the operation of rate bureaus and the competitive conditions of the transportation industry are matters within the special expertise of the ICC" (App. 14a-15a) the court found that the rule is consistent with past agency practice on docketing (*id.* at 13a) and reflects "thorough consideration of the competing" factors (*id.* at 14a).

ARGUMENT

The court of appeals correctly affirmed the Commission rule barring rate bureaus from requiring the docketing of independent actions. That aspect of the decision conflicts with no decision of this Court or any court of appeals and presents no legal issue of general importance warranting this Court's review. Although, as we explain in our petition in No. 82-1643, we believe that other aspects of the decision below do warrant further review, that review would not be illuminated by consideration of the completely unrelated issue raised in this cross-petition.

Petitioners contend (Pet. 5-11) that the independent action rule is unlawful because it is an entirely new requirement that goes beyond the specific restrictions imposed by Section 14 of the 1980 Act. However, as the court of appeals found, the rule is "but an interpretation of the statutory right of independent action" that comports with congressional intent and is consistent with prior practice (App. 12a, 14a).

Section 14 specifies that rate bureaus "may not interfere with each carrier's right to independent action" (49 U.S.C. (Supp. V) 10706(b)(3)(B)(ii)). Moreover, as petitioners

readily acknowledge (Pet. 9), the independent action right must be "absolute" and "free and unrestrained." Thus, if any practice restricts the right of independent action, the 1980 Act prohibits it. Mandatory docketing of independent actions is contrary to Section 14. It necessarily forces carriers either to give advance notice to competitors and thereby forgo the competitive advantage of being first with a rate reduction, or to file their independently established rate on their own (rather than through the bureau). See App. 38a. Because mandatory docketing gives the rate bureau the power to override an individual carrier's wishes that no advance notice be given, the court of appeals was entirely correct when it held "[r]equiring carriers who undertake independent action through bureau filing to docket their rate proposals is reasonably viewed as a restriction of the freedom of independent action" (*id.* at 14a).[7]

Petitioners assert (Pet. 11-12) that rate bureau agreements have traditionally required docketing, and that the Commission itself has by regulation ordered mandatory docketing. The court below, however, correctly recognized that the independent action rule is consistent with—not contrary to—prior practice (App. 12a-14a). The Commission in 1956 and again in 1957 explicitly barred mandatory docketing.[8] Petitioners misinterpret 49 C.F.R.

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[7]Petitioners claim (Pet. 13) that Section 11 of the 1980 Act (94 Stat. 801), 49 U.S.C. (Supp. V) 10708(d)(1), contemplates mandatory docketing. But Section 11 simply provides antitrust immunity *if* carriers docket rates proposed under the zone of rate freedom created by 49 U.S.C. (Supp. V) 10708. Neither Section 11 nor any other section of the 1980 Act *requires* docketing. To the contrary, Section 11, like the Commission's independent action rule, merely permits it.

[8]*Intercoastal Steamship Freight Association—Agreement*, 297 I.C.C. 759, 762 (1956); *Southern Motor Carriers—Agreement*, 297 I.C.C. 603, 609-610 (1956); *Central States Motor Common Carriers—Agreement*, 299 I.C.C. 773, 778-779 (1957). To retain members' unrestrained freedom to take independent action, the Commission also has struck down

1331.5 (1969),[9] which simply requires that when an independent action is announced, *i.e.*, docketed, notice must be given to shippers and carriers alike.[10] There is no indication in the agency's decision adopting the regulation[11] that the Commission intended to overrule its several prior cases

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agreement provisions that dictate the kind of tariff (bureau or individual) a carrier could use to publish independent actions, *Rocky Mountain Motor Tariff Bureau, Inc.—Agreement*, 293 I.C.C. 585, 594-596 (1954), and prohibited bureaus from filing administrative protests against their members' independent actions. *Rate Bureau Investigation*, 351 I.C.C. 437, 459-460 (1976), aff'd *sub nom. Motor Carrier Traffic Association* v. *United States*, 559 F.2d 1251 (4th Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

[9]That regulation states in pertinent part:

> When independent action is announced and tariff publication is to be made by a [rate bureau] * * *, notification thereof will be given by the [bureau] to the same extent and in the same manner that the [bureau] gives notice of [collective] actions.

[10]Petitioners apparently believe (Pet. 12 & n.13) that use of the word "announced" rather than "docketed" in the regulation indicates that 49 C.F.R. 1331.5 (1969) requires docketing of independent actions. But the court of appeals correctly explained (App. 13a-14a n.14):

> The purpose of this rule was to require rate bureaus to give notice to the shipping public of independent actions, as they were already required to do of collective actions, because notice to the shipping public was deemed essential for collective actions and docketed independent actions have the potential of taking on the character of collective actions. *See Notice of Independent Action*, 332 I.C.C. 22 (1967). Thus, the Commission in its decision construed this regulation to apply only where an independent action is docketed; in such a case notice must be given equally to shippers as to other carriers. 46 Fed. Reg. 30095. Where independent action is not docketed, there is no opportunity for the rate to become collective action, and therefore the regulation does not apply. Thus construed, the regulation is not inconsistent with the independent action rule.

Moreover, even if this were not the case, the Commission's present rule, which is consistent with Section 14 of the 1980 Act, would clearly take precedence over 49 C.F.R. 1331.5.

[11]*Notice of Independent Action*, 332 I.C.C. 22 (1967).

explicitly banning mandatory docketing, or that it was even addressing the issue of mandatory docketing. To the contrary, the decision simply accepted the fact of permissive docketing and then addressed the problem created when such docketing effectively converts independent actions into collective ones.

In any event, even assuming arguendo that the independent action rule can be considered a reversal of past policy as petitioners claim (Pet. 12), the Commission is "neither required nor supposed to regulate the present and future within the inflexible limits of yesterday." *American Trucking Associations, Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). Rather, the Commission is free to interpret the public interest in a manner different from the interpretations of the past.[12] Contrary to petitioners' bald assertions (Pet. 6-7), the Commission retains authority to promulgate regulations to implement the Section 14 restrictions on rate

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[12]Petitioners urge (Pet. 9-10) that because new Section 10706(b)(3)(B)(ii) essentially restated the Reed-Bulwinkle Act requirement that the right of independent action be "free and unrestrained," the Commission lacked the authority to promulgate a new independent action rule. They also contend (Pet. 12-13) that the Motor Carrier Act of 1980 "contemplates a continuation of the past rule" because if Congress had "desired or intended to impose a rule such as that imposed here, it obviously would have done so in the statute." Neither claim has merit. It is well settled that a decision to reenact a clause without change indicates simply that the prior policy is within the realm of acceptable agency action, and not that such policy is the only way to implement a statutory scheme. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350-352 (1953); *Nueces County Navigation District No. 1* v. *ICC*, 674 F.2d 1055, 1064 n. 9 (5th Cir. 1982), cert. denied, No. 82-341 (Nov. 29, 1982). Congress has never indicated that the Commission should require the rate bureaus to docket independent action. The Commission accordingly had the authority to make clear, in a rulemaking proceeding, that such docketing may not be mandatory.

bureaus and rate bureau agreements. See 49 U.S.C. (Supp. V) 10321(A).[13] Because the independent action rule "(c)learly * * * increases the prerogative of the independent actor" (App. 14a), it is consistent with Section 14 and an appropriate exercise of agency discretion.

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[13]Petitioners contend (Pet. 7) that in the 1980 Act Congress "roundly condemned the ICC's efforts to rewrite the regulatory scheme by rule." There is, as the court below recognized (App. 7a-9a), no such effort here; the Commission has simply promulgated regulations to implement Section 14. Petitioners have, in any event, mischaracterized the legislative history. In discussing the new Section 14, neither the House nor the Senate Report contains any criticism of the Commission's exercise of its authority to approve rate bureau agreements under the earlier statutes. H.R. Rep. No. 96-1069, *supra*, at 27-30; S. Rep. No. 96-641, 96th Cong., 2d Sess. 12-15, 30-32 (1980). Instead, the reports note that "the Commission has recently embarked upon a series of reviews of rate bureau agreements to determine whether they should be continued and, if so, under what conditions." H.R. Rep. No. 96-1069, *supra*, at 27; S. Rep. No. 96-641, *supra*, at 13. Congress adopted the only Commission action it identified as resulting from the review, albeit on a somewhat different time schedule (*ibid.*). Moreover, the Senate Report notes (at 31-32) that several of the new statutory requirements (see page 3, *supra*) are based on Commission decisions and regulations.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN BROADLEY
General Counsel

LAWRENCE H. RICHMOND
Deputy Associate General Counsel

EVELYN G. KITAY
Attorney

Interstate Commerce Commission

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